Filed 4/26/12 Bankhead v. Pneumo Abex LLC CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EMILY BANKHEAD, Plaintiff and Respondent, v. PNEUMO ABEX LLC, Defendant and Appellant.	A131378 & A135224 (Alameda County Super. Ct. No. RG10502243)

In this asbestos personal injury case, a jury found Pneumo Abex LLC (Abex) liable to Gordon and Emily Bankhead[1] for compensatory and punitive damages. On appeal, Abex does not challenge the jury's verdicts as to liability or the amount of compensatory damages. It contends only that the punitive damages award is excessive because the trial court erred in excluding from evidence an unaudited financial statement for Abex that was not prepared in the ordinary course of business, and in admitting evidence of Abex's contractual right to indemnity from third parties, as well as evidence regarding the financial condition of those third parties. We hold that the exclusion of the unaudited financial statement was proper. We also conclude that given the limited purpose for which the trial court admitted the challenged evidence, and the other evidence supporting the punitive damages award, Abex has not satisfied its burden on

[1] Gordon Bankhead died during the pendency of this appeal. On November 28, 2011, his widow, Emily Bankhead, was substituted in on behalf of his estate. We refer to Gordon Bankhead individually as Bankhead, and refer collectively to Bankhead, his estate, and his widow as "plaintiffs."

appeal to show that there was any error in the trial court's evidentiary rulings. Nor has Abex shown that it was prejudiced by any of the errors it contends were committed. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

As is required on review after a jury trial, in reciting the facts, we "resolv[e] . . . all conflicts in the evidence and all legitimate and reasonable inferences that may arise therefrom in favor of the jury's findings and the verdict. [Citations.]" (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1137-1138.) We give only a general summary of the facts relating to liability and compensatory damages, because the details are not germane to the issues presented by this appeal.[2]

Abex is the successor in interest to another company, Abex Corporation,[3] which manufactured asbestos-containing friction products, including brake linings for installation on commercial truck brakes.[4] At least by the 1960's, Abex knew that workers

---

[2] For the same reason, we do not consider Abex to have forfeited any of the issues it raises on appeal by virtue of its failure to present a complete summary of these facts in its posttrial motions or its opening brief on appeal.

[3] Pneumo Abex LLC does not dispute its liability for the acts and omissions of Abex Corporation, its predecessor in interest. Accordingly, we draw no distinction between the two companies, and refer to them collectively as Abex.

[4] Plaintiffs originally sued numerous companies alleged to have contributed to Bankhead's asbestos-related mesothelioma. All of the defendants except Abex and ArvinMeritor, Inc. (ArvinMeritor) had settled by the time this case was briefed on appeal. Abex and ArvinMeritor each filed separate appeals from the original judgment. Abex's appeal was assigned case number A131378, and ArvinMeritor's appeal was assigned case number A131587. After the trial court entered an amended judgment, Abex and ArvinMeritor each appealed from the amended judgment, and the resulting appeals were both assigned case number A132985 (the joint appeal). All three appeals were consolidated, and only one record was filed. However, we eventually vacated the consolidation, bifurcated the joint appeal, and consolidated each appellant's portion of the joint appeal with that appellant's respective separate appeal. This opinion addresses only the contentions raised by Abex in its separate appeal (A131378) and its portion of the joint appeal, which has been redesignated as case number A135224 (Order, Apr. 23, 2012, Ruvolo, P. J.). We disposed of ArvinMeritor's separate appeal, and its portion of the joint appeal, in a separate published opinion filed on April 19, 2012 (*Bankhead v. ArvinMeritor, Inc.* (2012) ___ Cal.App.4th ___.

exposed to asbestos dust were at risk of developing asbestos-related diseases, including mesothelioma. Nonetheless, Abex did not put warnings on its products until 1972 or later, and even then, only used the word "caution." Abex continued to sell asbestos-containing brake products until 1987.

In 1994, Abex sold its entire friction product division to another company, Wagner Electric Corp. (Wagner), a subsidiary of Cooper Industries, Inc. (Cooper Inc.). As consideration for the sale, Abex received over $207 million in cash, and an indemnity agreement from Wagner for asbestos-related claims against Abex brought after 1998. Wagner's parent corporation, Cooper Inc., later became Cooper Industries, LLC (Cooper LLC), which in turn is a subsidiary of another entity, Cooper Industries plc (Cooper plc).

In 1998, Wagner was sold to Federal-Mogul Corporation (FM), which agreed to assume Wagner's indemnity obligations to Abex. As part of the sale transaction, Cooper LLC agreed to guarantee the payment of the indemnity obligations owed to Abex by Wagner. Accordingly, after FM filed for Chapter 11 bankruptcy in 2001, Cooper LLC took responsibility for paying asbestos-related judgments against Abex. (See generally *In re Federal-Mogul Global, Inc.* (Bk. D. Del. 2010) 438 B.R. 787, 800-801.)

Abex continued to operate other aspects of its business until 2004, but then went out of business entirely, and ceased to generate any income. At the time this case went to trial, Abex still existed as a legal entity, but its principal activity was responding to claims and lawsuits, primarily for asbestos-related injuries. In order to cover its remaining asbestos-related liabilities, Abex relies on its right to indemnity from Wagner, which Cooper LLC, as guarantor, actually pays.

Bankhead was exposed to asbestos dust from brake linings, including those manufactured by Abex, during the 30 years he worked at automotive maintenance facilities, primarily as a "parts man," starting in 1965 and continuing through his retirement in 1999. As a result of this exposure, Bankhead contracted mesothelioma, a form of lung cancer, in 2009. Before his mesothelioma was diagnosed in January 2010, Bankhead experienced difficulty breathing, and underwent painful medical treatment to drain fluid from one of his lungs. After the diagnosis, Bankhead was told he only had 12

months to live,[5] and as his disease progressed, the quality of his life decreased significantly. At trial, Bankhead's medical experts testified that his condition would become increasingly painful until his inevitable death.

After Bankhead's mesothelioma was diagnosed, he sued numerous defendants, including Abex and ArvinMeritor. By the time the case went to trial on October 15, 2010,[6] Bankhead had settled with all but four of the defendants.

On November 22, during the first phase of the trial and in anticipation of the possibility that the jury would award punitive damages, plaintiffs sought discovery regarding Abex's financial condition. Plaintiffs subpoenaed various documents covering the period from 2008 through 2010, including income statements; balance sheets; cash flow statements; and documents regarding loans, payments, or lines of credit issued to Abex, as well as documentation of Abex's profits from 1965 through 2010 from the sale of asbestos-containing brake products. The documents were to be produced by December 13.

Abex objected to this discovery on numerous grounds, including that it was premature unless and until the jury found Abex liable for punitive damages. On December 16, during a break in closing argument on the first phase of the trial, the court and counsel discussed the scheduling of the second phase. In that context, plaintiffs' counsel noted that they still had not received financial discovery from the defendants. On December 20, plaintiffs filed a brief requesting the trial court to enforce compliance with the subpoena.

On December 22, the jury returned its verdict in the first phase of the trial. The jury found against all of the defendants as to liability, allocating fault 30 percent to each brake lining manufacturer (Abex and one other), 15 percent to each brake shoe manufacturer (ArvinMeritor and one other), and 10 percent to other defendants. The jury calculated plaintiffs' economic damages at $1.47 million, including Bankhead's medical

---

[5] As already noted, although Bankhead did live longer than 12 months after his diagnosis, he died during the pendency of this appeal.

[6] All further references to dates are to the year 2010 unless otherwise noted.

expenses, lost earnings, and lost retirement benefits, and the value of the household services he had been providing before he became ill. It also awarded a total of $2.5 million in noneconomic damages for Bankhead's pain, suffering, and emotional distress, and his wife's loss of consortium. Based on its 30 percent share of fault, Abex was held jointly and severally liable for the $1.47 million in economic damages, and severally liable for $750,000 of the noneconomic damages, for a total of $2.22 million.[7]

The jury's verdict in the first phase of the trial also found all defendants liable for punitive damages. Accordingly, on December 22, the trial court asked the jurors whether they would be available for two consecutive days starting January 10, 2011, for the punitive damages phase of the trial. After conferring amongst themselves, the jurors indicated that they were all available on January 5 and 6, 2011, but if the second phase of the trial could not be set on those dates, they would not all be available again until mid-February 2011.

As already noted, by the time the jury returned its verdict on the first phase of the trial, Abex had missed the date by which it was to produce the financial documents plaintiffs had subpoenaed, and plaintiffs had requested the court to compel Abex's compliance with the subpoena.[8] Thus, when the trial court suggested that the second phase of the trial be set on January 5, 2011, plaintiffs' counsel responded that those dates

---

[7] In fact, Abex's liability for economic damages was reduced to zero after trial, because these damages were offset in their entirety by the proceeds from plaintiffs' settlements with other defendants. Abex does not contend that this reduction affects the issues presented by this appeal.

[8] This was not the first time plaintiffs had experienced difficulty in obtaining discovery from Abex. On October 8, 2010, the trial court issued a written order granting plaintiffs' motion to compel Abex to produce documents and produce a witness to testify regarding the documents. As of October 26, Abex still had not produced all the documents plaintiffs had requested. On that date, the trial court gave Abex until October 29 to provide plaintiffs with a status report and a declaration regarding its document search. Abex failed to provide the declaration, and during the trial proceedings on November 3, the trial court indicated that it would consider imposing nonmonetary sanctions on Abex due to its dilatoriness in providing discovery. Abex sought writ review from this court, which we denied.

posed a problem because of Abex's failure to produce its financial records. The court reminded Abex's counsel that it had informed the parties when the case was bifurcated the court expected them to have the relevant financial information available without unnecessary delay if the jury found liability for punitive damages. The court therefore gave Abex until noon on December 27 (a Monday) to hand deliver the documents to plaintiffs' counsel, and set a status conference by telephone for the afternoon of the same day in the event there was a problem with compliance. The court warned Abex that there would be consequences (the court used the term "responses") in the event of Abex's "unreasonable failure to participate in a production of records for [the] phase two trial."

On Monday December 27, the trial judge held a status conference by telephone regarding the progress of plaintiffs' efforts to obtain discovery from the defendants, including Abex. Plaintiffs' counsel reported that Abex had produced an unaudited, unsigned financial statement, showing that Abex had no expenses and no income. Abex's counsel explained that Abex "exists basically as a facility to process claims," and was not an "ongoing concern," having been "out of business for years." Plaintiffs' counsel noted that documents counsel had obtained elsewhere indicated that Abex was a wholly owned subsidiary of a publicly traded entity called "M & F Worldwide Industries" (M & F), and that the financial statement of M & F indicated that at least some of Abex's liabilities had been assumed by third parties.

Abex offered to produce Steven Fasman, its president, to "explain the financial documents" and Abex's relationships with third parties, including insurance carriers, who had assumed certain of its liabilities. Plaintiffs' counsel argued that it would not be sufficient to produce Fasman "with absolutely no useful documents," so he could "say whatever he wants." Counsel reiterated plaintiffs' request for additional documents regarding Abex's financial condition. The trial judge responded that "if the court concludes after [hearing counsel's] report of Mr. Fasman's deposition that . . . Abex is withholding information that it should reasonably have produced, the court will give an instruction to the jury that it may assume that . . . Abex may respond in any reasonable amount by way of punitive damages." The court then remarked that the "real question"

was "[w]hether M & F and its financial worth should be imputed in some part or in whole to . . . Abex for the purpose of assessing a reasonable punitive damage award."

After some discussion regarding scheduling, the court ordered Abex to produce "all documents that are responsive to the subpoena," including documents of M & F pertaining to the operations of Abex, and to deliver them to respondent's counsel by email or hand delivery, by noon on Wednesday, December 29. Fasman was to be produced for his deposition in New York on Thursday, December 30. The court ordered that if no additional records responsive to the subpoena existed, including audited financial statements and reports of Abex's revenues from asbestos-containing brake friction products, Fasman should so state on the record at the deposition.

At Fasman's deposition, he testified that he is an employee of a company called MacAndrews and Forbes Holdings, Inc. (MacAndrews), which is an indirect owner of Abex. Fasman is an attorney, and has worked in a legal capacity at MacAndrews since 1992; at the time of his deposition, his job title was senior vice president for law. Fasman explained that Abex does not currently have any business operations, shareholders, or employees of its own. Fasman's job duties for MacAndrews include serving as Abex's president, and overseeing asbestos litigation arising from Abex's past business. The actual conduct of the litigation, however, is supervised by Cooper LLC, due to its responsibility to indemnify Abex for asbestos liability.

Fasman confirmed that Abex itself had not paid since 1995, and did not expect to pay, "material amounts" in connection with any contingent claims against it, including asbestos claims, because "substantially all" of those claims were "the financial responsibility of third parties." Fasman testified that it was Abex's position that Cooper LLC would be responsible for paying any judgment entered against Abex in the present case. Fasman also stated that Abex had recently estimated the value of Cooper LLC's guaranty of the indemnity at "in excess of [$]100 million," though he stressed that "valuing an asset like the Cooper [LLC] guaranty is a highly subjective exercise."

Fasman did not know what had happened to the $207 million in cash that Abex received from Wagner for its friction products division in 1994. When asked what happened to the money, he responded that "cash is fungible so it's very difficult to identify a particular set of cash and say it relates to this as opposed to that." The trial court later characterized Fasman's testimony as "strikingly fuzzy" and "evasive," and opined that "any rational juror could reasonably conclude not to ascribe any positive weight" to it.

In portions of Fasman's deposition testimony included in the appellate record, but not introduced into evidence at trial, Fasman testified that as of September 30, 2010, Abex had on hand about $875,000 in cash and cash equivalents. He also stated that all of Abex's expenditures in connection with asbestos-related claims are managed and paid for by third parties, and that no punitive damages had ever been awarded in an asbestos-related case against Abex until the present one. He professed to be unable to explain how, despite Abex's lack of expenses, the $207 million in cash that Abex received in 2004 came to be reduced to $875,000 in 2010.

Neither Fasman nor Abex provided plaintiffs with an audited financial statement for Abex, and Fasman did not know who had prepared the unaudited financial statement (exhibit 1501) that Abex made available for use at Fasman's deposition. Fasman testified that exhibit 1501 was not prepared in the ordinary course of business; rather, it was prepared in order to "have a set of complete financial statements" regarding Abex "[t]o show to Cooper Industries."[9] Fasman participated in preparing exhibit 1501, and provided some of the information incorporated into it. The trial court declined to admit exhibit 1501 into evidence at the subsequent trial, although plaintiffs' counsel were permitted to rely on some information it contained as admissions by an adverse party.

Beginning on January 5, 2011, a separate trial was held to determine the amount of punitive damages to be assessed against each defendant. By the time of that trial, all the

[9] It is not clear whether Fasman intended the term "Cooper Industries," in this context, to refer to Cooper LLC or Cooper plc.

defendants except Abex and ArvinMeritor had settled. At the punitive damages trial, plaintiffs presented an expert witness, Robert Johnson, to testify about Abex's financial condition. Plaintiffs also introduced portions of Fasman's videotaped deposition testimony.

Johnson characterized the financial data that Abex had provided, in the form of Fasman's testimony and the unsigned, unaudited financial statement marked as exhibit 1501, as "just about worthless." He noted that there was no way to tell, on the face of exhibit 1501, whether it was prepared in conformity with generally accepted accounting principles, and that such a statement is normally included in a document prepared by a CPA. He opined that due to the lack of financial data, he could only value Abex's financial condition based on what Abex received when the friction division was sold, and the value of the indemnity, which required looking at the resources of the indemnitors. Based on the price Wagner paid for Abex's friction division in 1994, which was just over $207 million, plus Johnson's assessment of the current value of the indemnity at $100 million, Johnson testified that a conservative estimate of Abex's wealth and financial condition was "somewhat over $307 million." He characterized $307 million as the "floor value" for Abex's financial condition and ability to pay.

On cross-examination by Abex's counsel, Johnson reiterated that apart from the indemnity agreement, Abex could potentially satisfy a judgment from the $207 million it received in 1994, which, "adjusting for inflation and time value of money, would probably be at least up to close to [$]300 million" as of the time of trial. He acknowledged that Abex was listed on its parent corporation's audited financial statement as a "nonoperating subsidiary," and that Fasman's testimony was that it had no employees or revenue, but opined that this did not mean it did not have assets or a net worth.

Johnson noted that Abex had received $207 million from the sale 16 years earlier, and that Fasman had not stated that the money did not still exist, only that it was " 'fungible,' " which Johnson interpreted to mean that "it kind of floated someplace." On cross-examination, Johnson was asked whether he could say with certainty that the

money was still available to satisfy a punitive damages claim against Abex. He responded, "I can't say it's not," and reiterated that exhibit 1501 was "worthless" and "not valid" because no accountant had signed or authenticated it. On redirect, Johnson also noted that the audited financial documents of Abex's parent indicated that they had not been required to pay for any Abex-related asbestos claims since 1995.

Abex's counsel asked Johnson to assume that the figures on exhibit 1501 were correct, and on that basis, to give an opinion as to whether Abex had the ability to respond to a punitive damages judgment. Johnson declined to give such an opinion, explaining that even if the numbers were accurate, they were incomplete, and therefore did not permit him to reach a conclusion on that issue one way or the other.

Johnson also testified about Abex's right to indemnity, and the financial condition of the indemnitor, Cooper LLC; its parent entity, Cooper plc; and Abex's parent company, M & F. Johnson opined (admittedly without distinguishing between Cooper LLC and Cooper plc) that "Cooper Industries is a very strong company," with "billions in revenue," "millions in profits," and "almost three-quarters of a billion dollars in available funds that can . . . be . . . used for whatever purpose they so choose." On redirect, over Abex's objection, Johnson testified that Abex's parent company was also a "sound company," with a net worth of about $606 million and over $300 million in cash at its disposal.

After the trial judge permitted plaintiffs to introduce evidence of the financial condition of Cooper, he instructed the jury that this information "may be considered only for the purpose of determining whether the indemnity agreement, if one is found to exist in favor of [Abex], is likely to be performable. In other words, [whether] Abex would be able to receive under the indemnity agreement sums which the jury might determine to be awardable, if any, by way of punitive damages, and for that one purpose only." Similarly, in admitting Cooper plc's annual report into evidence, the judge instructed the jury that "the exhibit is admitted for the limited purpose that the Court articulated" with regard to Johnson's opinion, that is, "only to the extent that it bears on the question of whether [Abex] would be able to enforce an indemnity obligation against Cooper."

As already noted, Abex's counsel cross-examined Johnson, but Abex did not offer any expert witness or other evidence during the second phase of the trial. The trial judge instructed the jury that in determining the amount of punitive damages to award, it should consider, "in view of [each] defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct"; that the award should not be increased "above an amount that is otherwise appropriate merely because the defendant has substantial financial resources"; and that "[a]ny award you impose may not exceed that defendant's ability to pay."

In closing argument, plaintiffs' counsel stressed that plaintiffs were not asking the jury to "kill" the defendant corporations, and that the law did not permit that. He reminded the jury that Abex had sold its friction products division in 1994 for over $200 million, plus an agreement to pay for its liabilities, including punitive damages, and opined that this made it "a very, very valuable corporation." Counsel also noted that Abex had not put on any witnesses to controvert Johnson's opinion about Abex's financial condition, and reminded the jury of the court's instruction that if a party provides weaker evidence when it could have provided stronger evidence, the jury was entitled to distrust the weaker evidence. Later in his closing argument, counsel noted that Abex had not produced evidence of the profit it had made from its asbestos-containing products.

Plaintiffs' counsel noted that Abex had not explained to the jury what happened to the $207 million the company received when its assets were sold to Wagner, and had not put on a witness "to explain why they don't have the ability to pay." He urged the jury not to allow Abex to avoid liability for punitive damages based on its current status as a nonoperating business.

Plaintiffs' counsel also remarked that the companies that were paying Abex under its indemnity agreement "have plenty of money, and they can afford to pay a punitive damage judgment." But he never asked the jury to rely on the financial worth of any company other than Abex in determining the amount of punitive damages. Rather, in arguing that the award against Abex should be "in the range of 14 to 15 million dollars,

. . . but not more," he explained his choice of that figure by noting that $15 million was "less than five percent of the [$]207 million plus the [$]100 million indemnification that's the lowest, most conservative number" given by Johnson for Abex's financial worth, and also bore a "reasonable relationship" to the compensatory damages the jury had previously awarded.

In the closing argument given by Abex's counsel, he urged the jury, in considering Abex's ability to pay for punitive damages purposes, to bear in mind that Abex no longer existed except as a vehicle for responding to asbestos claims, which were covered by an indemnity agreement. He pointed out that Abex's receipt of $207 million in 1994 did not mean anything about the company's current financial condition or ability to pay. He also stressed that Cooper LLC's obligation to indemnify Abex did not entitle the jury to render a verdict that would punish Cooper LLC, and that the relevant issue with regard to ability to pay was Abex's own current financial condition.

The jury returned a verdict awarding plaintiffs $9 million in punitive damages against Abex. Abex filed motions for judgment notwithstanding the verdict and for new trial. The trial court denied both motions, and this timely appeal ensued.

DISCUSSION

A. Standard of Review

Normally, "[w]hether punitive damages should be awarded and the amount of such an award are issues for the jury and for the trial court on a new trial motion. All presumptions favor the correctness of the verdict and judgment. [Citation.]" (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 387-388 (*Devlin*).) "Juries . . . have a wide discretion in determining what is proper. [Citation.]' [Citation.]" (*Id.* at p. 390.) Similarly, we normally "review a trial court's evidentiary rulings for abuse of discretion. [Citation.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

In the present case, however, Abex's challenge to the punitive damages award is based on evidentiary rulings by the trial court which Abex contends were erroneous as a matter of substantive law. "A trial court's decision that rests on an error of law is an

abuse of discretion. [Citations.]" (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 939; see also *Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at p. 281 [trial court abuses its discretion by action that " ' "transgresses the confines of the applicable principles of law" ' "].) Thus, where a trial court's decision on the admissibility of evidence depends on a legal question, the issue is a question of law, which we review de novo. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476.)

However, when not based on legal error, " '[a] trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed [on appeal] except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice . . . .' [Citations.]" (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

Even if a trial court's evidentiary rulings were the product of legal error, however, reversal does not necessarily result. "A judgment may be set aside on the ground of improper admission of evidence only if the error complained of was prejudicial. [Citations.] 'Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred.' [Citation.] To establish prejudice, an appellant must show a reasonable probability exists that, in the absence of the error, [the appellant] would have obtained a more favorable result. [Citation.]" (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 887.) "[I]mproperly admitted evidence only requires reversal or modification when it is reasonably probable a result more favorable to the complaining party would have been reached absent the error. [Citations.]" (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 697.) "Evidentiary rulings will be deemed harmless if the record demonstrates the judgment was supported by the rest of the evidence properly admitted. [Citation.]" (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122.)

B. Exclusion of Abex's Unaudited Financial Statement

Under California law, "[w]ealth is an important consideration in determining the excessiveness of a punitive damage award. Because the purposes of punitive damages are to punish the wrongdoer and to make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages. [Citation.]" (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1099-1100, citing *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 56.) "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]" (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) Moreover, "[b]oth California and the federal authorities agree that profits earned from tortious activity that supports an award of punitive damages are appropriately considered in the amount awarded. [Citations.]" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1697.)

Because of these standards for assessing the correct amount of punitive damages, both parties to this appeal agree that evidence regarding Abex's financial condition was not only admissible, but necessary, during the punitive damages phase of the trial. (See generally *Adams v. Murakami* (1991) 54 Cal.3d 105, 109 (*Adams*).) Abex argues, however, that the trial court made two evidentiary errors in this regard: (1) declining to admit exhibit 1501, Abex's unaudited financial statement; and (2) admitting evidence of Abex's right to indemnity from Wagner and Wagner's guarantors, as well as evidence about the financial condition of those parties (including Cooper LLC and Cooper plc).

The trial court permitted plaintiffs' counsel to rely on some of the information set forth in exhibit 1501 in questioning their expert witness, apparently on the basis that the statements contained in exhibit 1501 could be used against Abex as admissions by an adverse party. (Evid. Code, § 1220; see *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 244 (*StreetScenes*); see generally *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 523-524; *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150.) Abex does not argue that this ruling was incorrect, but contends that given this ruling, the trial court later erred in upholding plaintiffs' objection to admitting exhibit

1501 itself into evidence in its entirety. Abex maintains that the document was adequately authenticated to lay a foundation for its admission, and that once plaintiffs relied on selected portions of it, the entire document should have been admitted in order to place those portions in context.

In addressing these contentions, we take note of a portion of Fasman's deposition that was before the trial judge, and is included in the appellate record, but was not disclosed to the jury. During the deposition, Abex's counsel stipulated that exhibit 1501 was authentic, in the sense that it was a true and accurate copy of a document prepared on behalf of Abex, but expressly *declined* to stipulate that it was a business record. Accordingly, in arguing that exhibit 1501 should have been admitted into evidence, Abex cannot (and, to its credit, does not) rely on the business records exception to the hearsay rule. (Evid. Code, § 1271.)

Instead, Abex relies on Evidence Code section 356, which provides that "[w]here part of . . . [a] writing is given in evidence by one party, the whole [writing] on the same subject may be inquired into by an adverse party." However, exhibit 1501 itself was not "given in evidence," or relied upon, during the direct testimony of Johnson, plaintiffs' expert. In fact, Johnson made it abundantly clear that Abex's consolidated financial statement was "worthless," and no more than "numbers on a page," because there was no evidence that it was prepared in accordance with generally accepted accounting principles (GAAP), and it was not signed by anyone, much less by a CPA or chief financial officer. Thus, the exhibit was not acceptable to the expert as a valid statement of Abex's financial status, and did not form part of the basis for his opinion.

Abex argues on appeal that Johnson relied on "selective portions" of the statement, and that fairness therefore required the trial court to permit Abex to introduce the entire document. The only information set forth in exhibit 1501 that Johnson actually mentioned in his testimony, however, was that Abex had received $207 million for the sale of its assets in 1994, and was protected by an indemnity agreement that required third parties to pay asbestos-related personal injury claims against it. That testimony, however, was primarily based on the asset purchase agreement governing the sale, which

was admitted in evidence without any objection by Abex. Any mention of the indemnity reflected in exhibit 1501 was cumulative to the asset purchase agreement itself. As for Johnson's opinion that the value of Abex's indemnity was at least $100 million, Johnson made clear that it was based on an evaluation about which Fasman testified during his deposition. Johnson's opinion that Abex could enforce the indemnity agreement, in the sense that Abex's indemnitors could afford to pay any sums to which Abex was entitled, was gleaned from information regarding the financial condition of the indemnitors, not from exhibit 1501.

"The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 130.) Given the very limited purposes for which Johnson referred to exhibit 1501 in his direct testimony, we are not persuaded that the exclusion of exhibit 1501 resulted in any "misleading impression" or unfairness.

Moreover, while Abex argues that it offered exhibit 1501 "for the non-hearsay purpose of placing . . . into context" the information in the document to which plaintiffs had referred, this argument mischaracterizes the purpose for which Abex wanted to introduce exhibit 1501. It is plain from the record that Abex wished to use exhibit 1501 as affirmative evidence of the company's overall financial condition, and to show that its assets were offset by liabilities and expenses. This purpose was a matter of affirmative evidence, rather than simply a means to avoid mischaracterization by Johnson of the content of exhibit 1501. For that purpose, exhibit 1501 was plainly hearsay. (See *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1707-1709 [corporate documents were properly excluded from evidence where factual foundation to qualify them as business records had not been laid], superseded by statute on another ground as stated in *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1044-1045.)

Finally, Abex relies on *StreetScenes*, *supra*, 103 Cal.App.4th at pages 243-245. In that case, the trial court ordered the defendant to produce financial information to the

plaintiff for use in the punitive damages phase of the trial. The defendant's counsel provided the court with unaudited financial statements, and then objected to their admission on the ground of lack of authentication. The trial court held that the production of the documents by the defendant's counsel in response to the court's order was sufficient to authenticate them for use *against* the defendant as admissions by a party. (*Id.* at p. 244.) This ruling was upheld, but nothing in the opinion on appeal addresses the question presented here, i.e., whether the *defendant* was entitled to rely on the unaudited statements for the truth of the facts contained therein.

Moreover, even if exhibit 1501 had been otherwise admissible, the trial judge still was justified in excluding it as a form of sanction for Abex's failure to cooperate in discovery. A plaintiff seeking punitive damages has the burden of producing evidence and the burden of proof on the subject of the defendant's financial condition. (See, e.g., *Adams, supra,* 54 Cal.3d at pp. 110-111, 119-121; *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 452 (*Green*).) However, the facts regarding the defendant's financial condition are uniquely within the defendant's own knowledge. For that reason, the defendant cannot complain of deficiencies in the plaintiff's proof that stem from the defendant's failure to respond adequately to the plaintiff's efforts to obtain discovery or evidence on that subject. (*Green, supra,* 192 Cal.App.4th at pp. 452-454; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 40-41; *StreetScenes, supra,* 103 Cal.App.4th at pp. 243-244; *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609.)

Obviously, defendants facing a claim for punitive damages cannot be permitted to avoid liability by frustrating the plaintiff's efforts to obtain evidence on the defendant's financial condition. (See *Green, supra,* 192 Cal.App.4th at pp. 453-454 [where defendant's CEO "engaged in stonewalling" regarding plaintiff's efforts to investigate company's financial condition, defendant's claim of insufficient evidence to support punitive damages award was "chutzpah"].) Here, Abex waited until the eleventh hour to produce any evidence in response to plaintiffs' discovery efforts, despite a warning from the trial judge that he would expect the defendants to produce their financial information promptly if the jury found that plaintiffs were entitled to punitive damages. Abex

belatedly offered to make Fasman available for deposition, but he was unable to testify as to how the figures on exhibit 1501 had been derived, or whether they were accurate. By the time plaintiffs' counsel learned that Fasman was not prepared to provide this information, it was too late to seek additional discovery.

Given Abex's belated and inadequate compliance with its obligations to provide discovery regarding its financial affairs, Abex is not in a position to argue that it should have been permitted, over plaintiffs' objection, to introduce unverified information regarding its expenses and liabilities. Accordingly, we are not persuaded that the exclusion of exhibit 1501 was reversible error.

C. Admission of Evidence Relating to Indemnity Agreement

Abex's indemnity agreement from Wagner expressly provides for indemnity as to punitive damages awards arising from personal injury products liability cases. The enforceability of this provision under California law is uncertain, however.[10] (Compare *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 317 (*PPG Industries*) [public policy prohibits indemnification for punitive damages under insurance policies] with *Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1158 ["In the context of noninsurance indemnity agreements, . . . express indemnity allows contracting parties 'great freedom to allocate [indemnification] responsibilities as they see fit' "]; see also *Lemat Corp. v. American Basketball Assn.* (1975) 51 Cal.App.3d 267 [indemnity agreement covering indemnitee's preagreement wrongful conduct is enforceable]; *Marks*

[10] To complicate matters further, it is not clear that California law is what governs the enforceability of Abex's contractual right to indemnity for punitive damages. The contract containing Abex's indemnity from Wagner states explicitly that it is governed by Delaware law. At his deposition, Fasman testified that "[i]t is . . . Abex's position that all—any judgment [against Abex] in the [present case] would be the responsibility of Cooper Industries LLC to pay." Fasman did not mention punitive damages in this context, but he testified, during an earlier portion of the deposition not disclosed to the jury, that no final judgment for asbestos-related punitive damages had ever been entered against Abex. Thus, the record does not indicate that the enforceability of Abex's right to indemnification for punitive damages has ever been litigated. In any event, neither party has briefed or even raised any choice of law issues in this case, and we need not and do not address this issue.

v. Minnesota Mining & Manufacturing Co. (1986) 187 Cal.App.3d 1429, 1434-1438 [public policy does not preclude holding successor corporation liable for punitive damages based on conduct of predecessor].)

In any event, the question presented by this appeal is not whether Abex will ultimately establish a right to be indemnified for any punitive damages judgment entered against it in this case. That question is for another court in another case, and we do not reach it. The question here is whether the trial court erred, and prejudiced Abex, by permitting the jury to consider evidence of the existence of the indemnity agreement and the wealth of the indemnitor and its guarantors (the challenged evidence).

Under California law, as already noted, the sole purpose of punitive damages is to serve the public interest in punishment and deterrence of those who injure others through malice, fraud, or oppression. (*PPG Industries*, *supra*, 20 Cal.4th at pp. 317-318; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 980.) The case law makes clear that "[t]o accomplish this purpose, the award must be assessed against the party *actually responsible* for the wrong." (*Ford Motor Co. v. Home Ins. Co.* (1981) 116 Cal.App.3d 374, 380, italics added; cf. *Larez v. Holcomb* (9th Cir. 1994) 16 F.3d 1513, 1520-1521 [under federal law, jury should not have been informed that defendant's employer had discretion to indemnify defendant for punitive damages award]; cf. *In re Exxon Valdez* (9th Cir. 2000) 229 F.3d 790, 798-799 [absent exceptional circumstances, jury deliberating on amount of damages award should not be permitted to consider where funds to pay that award will come from; accordingly, jury should not be told that settling plaintiffs agreed to cede back portion of ultimate punitive damages award].) "It is inconsistent with the goal of punishment to transfer the punishment to an actor innocent of the conduct necessary to justify an award of punitive damages." (*Piscitelli v. Friedenberg*, *supra*, 87 Cal.App.4th at p. 982.)

Abex argues that under these principles, the jury should not have been informed of the indemnity agreement. Abex's argument ignores the fact that the challenged evidence was admitted only for a limited purpose. The trial judge told the jury that it could consider the challenged evidence "only for the purpose of determining whether the

indemnity agreement, if one is found to exist in favor of [Abex], is likely to be performable. In other words, Abex would be able to receive under the indemnity agreement sums which the jury might determine to be awardable, if any, by way of punitive damages, and for that one purpose only."

While the trial judge's admonition could have been phrased more clearly, it satisfactorily conveys the directive that except for the explicit purpose for which it was being admitted, the challenged evidence could not be used by the jury for any other purpose. This adequately informed the jury that it could not base the amount of punitive damages on the financial condition of any party other than Abex. Indeed, Abex's counsel clarified this point in closing argument by observing that in determining what amount of punitive damages to award, the jury could properly consider only Abex's financial condition, without regard to the existence or financial condition of its indemnitors or their guarantors. Notably, plaintiffs' counsel did not object to this argument, or in any way imply to the jury that it was incorrect.

Moreover, plaintiffs' counsel did not argue that the punitive damages award should be based on the financial condition of any company other than Abex itself. Rather, counsel stressed that in arriving at an amount to award, the jury should consider Abex's 1994 sale price, including the value of the indemnity agreement, as well as Johnson's uncontroverted opinion of Abex's financial condition. Plaintiffs' counsel also explained to the jury that the amount of punitive damages he was requesting—$13 million to $15 million—was based on Johnson's opinion that "the lowest, most conservative" estimate of Abex's current value was $307 million.

In any event, even if there was error, we conclude that it was harmless in light of the record as a whole. It is undisputed that Abex received $207 million in cash in 1994, had not paid any asbestos-related claims since 1995, and had no employees or normal operating costs at the time of trial. In addition, Johnson calculated that interest on the $207 million received in 1994 would total at least $100 million more by the time of trial. Given these facts, there is substantial evidence in the record justifying the jury in concluding that Abex was worth at least $207 million at the time of trial, and perhaps as

much as $307 million, including the interest. The $9 million in punitive damages that the jury awarded amounts to considerably less than plaintiffs' counsel suggested in closing argument, and, more importantly, less than five percent of $207 million, and only three percent of $307 million. It also bore a reasonable relationship—a single-digit multiplier—to the jury's prior award of $2.22 million in compensatory damages. (See generally *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543; *Boeken v. Philip Morris Inc.*, *supra*, 127 Cal.App.4th 1640; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573.) Thus, the jury's award of $9 million would have been reasonable, and supported by substantial evidence, even if the challenged evidence had been excluded, as Abex contends should have occurred. Accordingly, if the trial judge erred in failing to give the jury a sufficiently narrow admonishment regarding the purpose for which it could consider the challenged evidence, Abex has not satisfied its burden on appeal to demonstrate that it was prejudiced by any such error.

DISPOSITION

The judgment against Abex is affirmed. Plaintiffs shall recover their costs on appeal.

_____
RUVOLO, P. J.

We concur:

_____
RIVERA, J.

_____
SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.